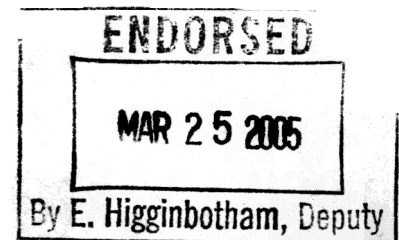


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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

CITIZENS TO SAVE CALIFORNIA, a
Coalition of Business and Taxpayer
Organizations, a California Public Benefit
Corporation; Assembly Member KEITH
RICHMAN, M.D.,
Plaintiffs,

Department Number: 32

Case Number: 05AS00555

**FINAL RULING ON MOTION FOR
PRELIMINARY INJUNCTION**

vs.

CALIFORNIA FAIR POLITICAL
PRACTICES COMMISSION; DOES I-X,
inclusive,
Defendants

ARNOLD SCHWARZENEGGER,
Governor, in his individual capacity;
GOVERNOR SCHWARZENEGGER'S
CALIFORNIA RECOVERY TEAM, a
candidate-controlled political committee,

Plaintiffs/Interveners

vs.

CALIFORNIA FAIR POLITICAL
PRACTICES COMMISSION; DOES I-X,
inclusive,

Defendants.

2 Citizens To Save California, a California Public Benefit Corporation, and
3 Assembly Member Keith Richman, M.D. ("Plaintiffs") move the court for issuance of a
4 preliminary injunction pursuant to Code of Civil Procedure sections 526 and 526a to
5 enjoin defendant California Fair Political Practices Commission ("FPPC") from enforcing
6 a recently adopted regulation regarding contributions to candidate-controlled ballot
7 measure committees - Title 2 California Code of Regulations section 18530.9 ("Regulation
8 18530.9").

9 Plaintiffs' motion is joined by Arnold Schwarzenegger, Governor
10 Schwarzenegger's California Recovery Team, Senator John Campbell, Rescue California
11 From Budget Deficits, and Taxpayers for Responsible Pensions who have intervened in
12 the action (Intervenors).

13
14 The motion is opposed in amicus curiae briefs filed by The Campaign Legal Center
15 ("CLC") and California Public Interest Research Group ("CPIRG"), which the court has
16 considered.

17 For the reasons set forth below, the Plaintiffs' motion for preliminary injunction is
18 granted.

19 20 SUMMARY OF ISSUES

21 Plaintiffs' request for injunction is primarily attendant to their discernible causes of
22 action for declaratory relief seeking to invalidate Regulation 18530.9. Although the court
23 notes that Plaintiffs have separately alleged a count for injunctive relief, including relief
24 based upon taxpayer status pursuant to Code of Civil Procedure section 526a, that count
25 alleges nothing more than a remedy which is dependent upon the declaratory relief
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1 claims.¹ Nevertheless, Plaintiffs' entire challenge to Regulation 18530.9 essentially
2 consists of two broad arguments. Plaintiffs contend: (1) Regulation 18530.9 violates the
3 Political Reform Act of 1974 ("PRA") because it conflicts with Government Code section
4 85303(c), amends the PRA, or is otherwise beyond the scope of the rulemaking authority
5 conferred by the PRA upon the FPPC; and (2) Regulation 18530.9, analyzed with strict
6 scrutiny, violates the plaintiffs' freedoms of speech and association afforded by the First
7 Amendment, and as protected by the Equal Protection Clause, of the United States
8 Constitution.
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10 The Intervenor echo most of the arguments advanced by the plaintiffs, and add a
11 contention bearing upon whether Regulation 18530.9 conflicts with the PRA. In
12 particular, the Intervenor describe additional inconsistencies between Regulation 18350.9
13 and the PRA which were not addressed in the plaintiffs' papers: (1) Government Code
14 section 85310(c) coupled with 85303(b) expressly permit a "person" to make a "payment"
15 of \$25,000 for a communication that clearly identifies a candidate made at the candidate's
16 behest within 45 days of an election, but Regulation 18530.9 prohibits such a "payment;"
17 and (2) Government Code sections 85210 and 89510 require contributions made to a
18 candidate to be deposited and held in a single identified account, and to be used only for
19 the candidate's campaign and office-holding expenses; however, Regulation 18530.9 does
20 not impose the same restrictions upon contributions to a candidate-controlled ballot
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25 ¹ Although plaintiffs allege taxpayer standing under Code of Civil Procedure section 526a as an
26 additional ground for injunctive relief, they provide no significant discussion on the matter on this
27 motion. Nevertheless, the court notes that evidence only that some illegal expenditure or injury to the
28 public fisc has or may occur will not usually suffice to establish irreparable harm necessary to support a
preliminary injunction. (*Leach v. City of San Marcos* (1989) 213 Cal.App.3d 648; *Cohen v. Board of
Supervisors* (1985) 40 Cal.3d 277, 286; see also *Waste Management of Alameda County, Inc. v. County
of Alameda* (3rd Dist. 2000) 79 Cal.App.4th 1223, 1240; *Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-
268.)

1 measure committee, even though the new regulation is greatly based upon the presumption
2 that all such contributions are “contributions made to a candidate.” The court also notes
3 that the Intervenor advance the additional claim that the challenged regulation violates the
4 Intervenor’s freedoms of speech and petition under Article I, Sections 2 and 3 of the
5 California Constitution.

6 FPPC opposes the motion contending: (1) Plaintiffs’ request for injunctive relief
7 upon its “statutory authority claim” is prohibited pursuant to Code of Civil Procedure
8 section 526(b)(4) because any injunction would unlawfully prevent the execution of a
9 public statute by officers of the law for the public benefit; (2) Regulation 18530.9 does not
10 conflict with Government Code section 85303(c) because all contributions to candidate-
11 controlled ballot measure committees are in “reality” contributions to the controlling
12 candidate; (3) Regulation 18530.9 is otherwise consistent with the PRA, is reasonably
13 necessary to effectuate its purpose, and its adoption does not otherwise exceed the
14 rulemaking authority conferred by the PRA upon the FPPC; (4) Regulation 18530.9 does
15 not violate the plaintiffs’ First Amendment freedoms of speech or association because the
16 regulation is “closely drawn” to match the “sufficiently important interest” of the state to
17 prevent candidate corruption, the appearance of corruption, and the circumvention of
18 applicable campaign contribution limits; (5) the varying contribution limits under
19 Regulation 18530.9 do not violate the Equal Protection Clause because contribution limits
20 tailored to the varying statuses of candidates has obtained constitutional acceptance where
21 the differential limits do not prevent effective advocacy; (6) plaintiffs have not
22 demonstrated a threat of irreparable harm because there is no evidence that the
23 contribution limits imposed under Regulation 18530.9 prevent effective advocacy; and (7)
24 the balance of equities weighs in favor of the FPPC because the potential impairment of
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1 plaintiffs' constitutional interests is far outweighed by the irreparable harm that would be
2 suffered by the People of California if an injunction issued. The amicus curiae parties
3 support or amplify most of these contentions.

4 PRELIMINARY INJUNCTIVE RELIEF- STANDARD

5 With these opposing positions outlined, the court must analyze each argument
6 through the general balancing test that governs most provisional injunctive relief. The
7 principles guiding the court's analysis in this matter are well-established and require only
8 summary recitation.
9

10 "In determining whether or not to issue a preliminary injunction, a trial court must
11 evaluate two interrelated factors. The first is the likelihood that the plaintiff will prevail on
12 the merits at trial. The second is the interim harm the plaintiff may suffer if the injunction
13 is denied as compared to the harm that the defendant may suffer if the injunction is
14 granted." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70; *Tahoe Keys*
15 *Property Owners' Ass'n v. State Water Res. Co.* (1994) 23 Cal.App.4th 1459, 1471) In
16 thus balancing the respective equities of the parties, the court must determine whether,
17 pending a trial on the merits, the defendant should or should not be restrained from
18 exercising the right claimed by it. (*Id.*) The trial court's determination must be guided by a
19 'mix" of the potential-merit and interim-harm factors; the greater the plaintiff's showing
20 on one, the less must be shown on the other to support an injunction. (*King v. Meese*
21 (1987) 43 Cal.3d 1217, 1227-1228.) Of course, "[t]he scope of available preliminary relief
22 is necessarily limited by the scope of the relief likely to be obtained at trial on the merits."
23 (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442.) A trial court may
24 not grant a preliminary injunction, regardless of the balance of interim harm, unless there
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1 is some possibility that the plaintiff would ultimately prevail on the merits of the claim.
2 (*Id.*, at pp. 442-443.)

3 Where the defendant is a public agency and the plaintiff seeks to restrain the
4 agency in the performance of its duties, the court's determination is also influenced by
5 public policy considerations. There is a general rule against enjoining public officers or
6 agencies from performing their duties. (*Tahoe Keys Property Owners' Ass'n v. State Water*
7 *Res. Co.*, *supra*, 23 Cal.App.4th at p. 1471.) "This rule would not preclude a court from
8 enjoining unconstitutional or void acts, but to support a request for such relief the plaintiff
9 must make a significant showing of irreparable injury." (*Id.*)

11 "The loss of First Amendment freedoms, for even minimal periods of time,
12 unquestionably constitutes irreparable injury." (*Ketchens v. Reiner* (1987) 194 Cal.App.3d
13 470, 480; citing *Elrod v. Burns* (1976) 427 U.S. 347, 373; *New York Times Co. v. United*
14 *States* (1971) 403 U.S. 713; *American Booksellers Assn., Inc. v. Superior Court* (1982)
15 129 Cal.App.3d 197, 206; but see, *Sundance Saloon, Inc. v. City of San Diego* (1989) 213
16 Cal.App.3d 807, 817-818, ["In any given case the harm done to the general citizenry by
17 enjoining laws adopted by them or their elected representatives must be compared to the
18 harm done an individual or the citizenry itself by allowing the law to operate without
19 restraint.. [I]t is illogical to rotely and routinely enjoin the enforcement of all laws
20 affecting free speech without the imposition of human judgment to evaluate the competing
21 interests.]

24 LIKELIHOOD OF SUCCESS ON THE MERITS.

25 The first factor of the balancing test requires the court to consider whether the
26 plaintiffs have demonstrated a reasonable probability of success upon some or all of the
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1 grounds of their action. Therefore, the court individually addresses the strength of
2 plaintiffs' independent challenges to Regulation 18530.9.

3 Whether Regulation 18530.9 Violates The PRA

4 Plaintiffs allege that Regulation 18530.9 violates the PRA because it specifically
5 conflicts with Government Code section 85303(c), amends the PRA, or is otherwise
6 beyond the broad scope of the FPPC's rulemaking authority conferred by the PRA. These
7 three contentions require a preliminary discussion of the general policies guiding the
8 court's review of the FPPC's exercise of its rulemaking authority.
9

10 Administrative agencies have only the powers conferred on them, either expressly
11 or impliedly, by the Constitution or by statute, and administrative actions exceeding those
12 powers are void. (*American Federation of Labor v. Unemployment Ins. Appeals Bd.*
13 (1996) 13 Cal.4th 1017, 1042; *Terhune v. Superior Court* (1998) 65 Cal.App.4th 864, 872-
14 873.) To be valid, administrative action must be within the scope of authority conferred
15 by the enabling statutes. (*Morris v. Williams* (1967) 67 Cal.2d 733, 748; *Terhune v.*
16 *Superior Court*, supra, 65 Cal.App.4th at pp. 872-873 .) The courts usually give great
17 weight to the interpretation of an enabling statute by officials charged with its
18 administration, including their interpretation of the authority vested in them to implement
19 and carry out its provisions. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th
20 294,309.) But regardless of the force of administrative construction, final responsibility for
21 interpretation of the law rests with the court. If the court determines that a challenged
22 administrative action was not authorized by, or is inconsistent with acts of, the Legislature,
23 that action is void. (*Association for Retarded Citizens v. Department of Developmental*
24 *Services* (1985) 38 Cal.3d 384, 391; *Terhune v. Superior Court*, supra, 65 Cal.App.4th at
25 p. 873.)
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1 These principles apply to the rulemaking power of an administrative agency, which
2 is limited by the substantive provisions of the law governing that agency. (*Environmental*
3 *Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43
4 Cal.App.4th 1011, 1022; *Masonite Corp. v. Superior Corp.* (1994) 25 Cal.App.4th 1045,
5 1053; *Physicians & Surgeons Laboratories, Inc. v. Department of Health Services* (1992)
6 6 Cal.App.4th 968, 982.) To be valid, an administrative regulation must be within the
7 scope of the authority conferred by the enabling statute or statutes. (*Woods v. Superior*
8 *Court* (1981) 28 Cal.3d 668, 680; see Gov. Code, §§11342.1, 11342.2.) No matter how
9 altruistic its motives, an administrative agency has no discretion to promulgate a regulation
10 that is inconsistent with the governing statutes. (*Agricultural Labor Relations Bd. v.*
11 *Superior Court* (1976) 16 Cal. 3d 392, 419; *Terhune v. Superior Court, supra*, 65
12 Cal.App.4th at pp. 873.)

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14
15 In reviewing the validity of a regulation, the court's function is to inquire into its
16 legality, not its wisdom. (*Morris v. Williams* (1967) 67 Cal.2d 733, 737.) The court's task
17 "is limited to determining whether the regulation (1) is 'within the scope of the authority
18 conferred' (Gov. Code, §11373) and (2) is 'reasonably necessary to effectuate the purpose
19 of the statute' (Gov. Code, §11374)." (*Agricultural Labor Relations Bd. v. Superior Court*
20 (1976) 16 Cal.3d 392, 411.) In sum, the court determines whether the agency "reasonably
21 interpreted the legislative mandate." (*Fox v. San Francisco Residential Rent etc. Bd.*
22 (1985) 169 Cal.App.3d 651, 656.)

23
24 "The level of deference the trial court accords to an agency's interpretation turns on
25 a legally informed, commonsense assessment of its merits in the context before the court.
26 To that end, the court considers whether the agency has a comparative interpretive
27 advantage over the court, and also whether its interpretation is likely to be correct. Factors
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1 suggesting the agency is correct include indications of careful consideration by senior
2 officials, particularly a collective decision reached after public notice and comment;
3 evidence that the agency has consistently maintained the interpretation; and indications
4 that the interpretation is contemporaneous with the enactment of the statute or regulation
5 being interpreted.” (*Brown v. Fair Political Practices Com.* (2000) 84 Cal.App.4th 137,
6 150, citing *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1,
7 12-14; *State Farm Mutual Automobile Ins. Co. v. Quackenbush* (1999) 77 Cal.App.4th 65,
8 71, 75.)

10 The FPPC is one of those agencies whose expertise is entitled to deference from
11 the courts. (*Thirteen Committee v. Weinreb* (1985) 168 Cal.App.3d 528, 532-533.)
12 Moreover, where the regulation at issue is one deemed necessary to effectuate the purposes
13 of the statute, the court applies a more deferential standard of review, requiring only that
14 the regulation be reasonable. (*Henning v. Division of Occupational Saf. & Health* (1990)
15 219 Cal.App.3d 747, 757-758.) This is particularly true where the quasi-legislative
16 decisions of the FPPC involve controversial issues that would entangle the court in a
17 “political thicket.” (*Californians for Political Reform Foundation v. Fair Political*
18 *Practices Com.* (1998) 61 Cal.App.4th 472, 484.) Therefore, the FPPC's interpretation of
19 statutes and regulations in the area of its expertise are entitled to “great weight” in the
20 court’s analysis “unless clearly erroneous or unauthorized.” (*Id.*; *Pacific Legal Foundation*
21 *v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 111; see also *Henning v.*
22 *Industrial Welfare Com.* (1988) 46 Cal.3d 1262, 1269.)

25 Plaintiffs and Intervenors argue that the FPPC’s relevant interpretation of the PRA,
26 and its determination of the propriety of Regulation 18530.9 under the PRA, are entitled to
27 no deference. Both partially rely upon the FPPC’s prior contrary interpretation of the PRA
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1 to support that proposition. Intervenor specifically assert that the FPPC's "vacillating
2 position" is entitled to no deference citing two cases and a law review article. The court
3 finds that the two cases cited by Intervenor do not stand for the absolute proposition that
4 the FPPC's change in position denies it the deference to which it is otherwise entitled. To
5 the contrary, the FPPC, like any administrative agency, may change its interpretation of a
6 statute, rejecting an old construction and adopting a new, and is not disqualified from
7 changing its opinion. (*Californians for Political Reform Foundation v. Fair Political*
8 *Practices Com.*, *supra*, 61 Cal.App.4th 472, 488, citing *Henning v. Industrial Welfare*
9 *Com.*, *supra*, 46 Cal.3d at pp. 1269-1270.) Even when an agency adopts a new
10 interpretation of a statute and rejects an old, a court must continue to apply a deferential
11 standard of review. (*Id.*) Consequently, the FPPC's changed position regarding the
12 treatment of contributions to candidate-controlled ballot measure committees under the
13 PRA does not extinguish the deference it is due. Instead, the agency's significant change
14 in position is only one of many factors to be weighed in determining whether its
15 interpretation of the PRA in this specific instance is likely to be correct.

18 Pursuant to Government Code section 83112, the FPPC is expressly empowered to
19 adopt, amend and rescind rules and regulations to carry out the purposes and provisions of
20 the PRA. That express power must be exercised in accordance with the Administrative
21 Procedures Act, and consistent with the PRA and other applicable law. Pursuant to
22 Government Code section 81003, the PRA is to be liberally construed to accomplish its
23 purposes, which include ensuring "that individuals and interest groups in our society have
24 a fair and equitable opportunity to participate in the elective and governmental processes"
25 and minimizing "the potentially corrupting influence and appearance of corruption caused
26 by large contributions by providing reasonable contribution and voluntary expenditure
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1 limits.” However, pursuant to Government Code section 83111.5, the FPPC is
2 admonished to take no action to implement the PRA that would abridge constitutional
3 guarantees of freedom of speech, that would deny any person of life, liberty, or property
4 without due process of law, or that would deny any person the equal protection of the laws.

5 At this point, the court must also address a preliminary question of procedure and
6 evidence raised by the FPPC. FPPC argues that plaintiffs’ action for declaratory relief
7 falls within the scope of Government Code section 11350, so the court may only consider
8 the limited evidentiary record enumerated under Government Code section 11350(d).
9 Plaintiffs argue that Government Code section 11350 is no bar to the breadth of the record
10 on its motion, because the plaintiffs have stated a claim for injunctive relief independent of
11 their claim for declaratory relief. (Plaintiffs’ Reply, p.10, fn.12.) Plaintiffs’ claim for
12 injunctive relief is ancillary and dependent upon their declaratory relief claims, so it adds
13 no independent bases for review. The court finds that Government Code section 11350(d)
14 does limit the evidentiary record on the declaratory relief challenges to the statutory
15 validity of Regulation 18530.9. However, the record is not similarly limited on plaintiffs’
16 constitutional challenges alleging actual or threatened impairment of protected freedoms.
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19 The court is mindful of these several strictures as it weighs the parties’ competing
20 positions.
21

22 Government Code Section 85303(c) Conflicts With Regulation 18530.9

23 Plaintiffs argue that Regulation 18530.9 directly conflicts with Government Code
24 section 85303(c), and is invalid upon that ground alone. Government Code section
25 85303(c) expressly provides that nothing in the “Campaign Contribution and Voluntary
26 Expenditure Limits Without Taxpayer Financing Amendments to the Political Reform Act
27 of 1974” California Government Code section 85100, et seq. (“Chapter 5”), shall limit a
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1 person's contributions to a committee except as provided in Section 85310 and so long as
2 the contributions are used for purposes other than making contributions to candidates for
3 elective state office. Plaintiffs contend that Regulation 18530.9 conflicts with Section
4 85303(c) because the regulation limits a person's contributions to a committee even
5 though the contributions are used for purposes other than making contributions to
6 candidates for elective state office, and in a manner not restricted by the narrow exception
7 under Section 85310.
8

9 FPPC counters that Regulation 18530.9 does not conflict with Government Code
10 section 85303(c), because all contributions to a candidate-controlled ballot measure
11 committee are presumed to be contributions to a candidate for elective state office. Thus,
12 FPPC argues that the prohibition in Section 85303, which otherwise denies any limitation
13 upon contributions to committees under the many provisions of Chapter 5, does not apply.
14

15 Whether there is a reasonable probability that plaintiffs will prevail upon their
16 claim that Regulation 18530.9 directly conflicts with Government Code section 85303(c)
17 obviously requires consideration of the express content of the two laws, along with various
18 relevant collateral statutes and regulations.
19

20 Government Code section 85303 provides in relevant part:

21 “(a) A person may not make to any committee, other than a
22 political party committee, and a committee other than a
23 political party committee may not accept, any contribution
24 totaling more than five thousand dollars (\$5,000) per
25 calendar year for the purpose of making contributions to
26 candidates for elective state office.
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(c) Except as provided in Section 85310, nothing in this chapter shall limit a person's contributions to a committee or political party committee provided the contributions are used for purposes other than making contributions to candidates for elective state office."

Regulation 18530.9 provides in relevant part:

"(a) A ballot measure committee not controlled by a candidate for elective state office is not subject to the provisions of this regulation. A ballot measure committee becomes subject to the provisions of this regulation once it becomes controlled by a candidate for elective state office. However, a ballot measure committee controlled by an individual who ceases to be a candidate as defined in Government Code section 82007 is no longer subject to the provisions of this regulation.

(b) Notwithstanding Government Code sections 85310, subdivision (c), the contribution limits of Government Code sections 85301 and 85302 apply to any committee controlled by a candidate for elective state office that is established for the purpose of supporting or opposing state or local ballot measures. The applicable limit is that which applied to the controlling candidate at the time the ballot measure

1 committee was formed or became controlled by that
2 candidate.

3 ***

4 (d) A ballot measure committee primarily formed to support
5 or oppose a ballot measure or measures and controlled by a
6 candidate for elective state office is subject to the, post-
7 election fundraising limitations of Government Code section
8 85316. A general purpose ballot measure committee is not
9 subject to the post-election fundraising limitations of
10 Government Code section 85316.”
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14 Interpretation of Section 85303(c) and Regulation 18530.9 is guided and informed
15 by many specifically defined terms in the PRA and relevant regulations, which in the
16 interest of space, shall not be recited in this ruling unless particularly essential. (Cal.Gov’t
17 Code §82000.) Nonetheless, the court notes the following definitions that have been
18 consulted before analyzing the interaction between Section 85303 and the challenged
19 regulation: “Candidate” GC §82007; “Committee” GC§ 82013; “Contribution” GC
20 §82015, Title 2 CCR §18215; “Controlled committee” GC §82016; “Elective state office”
21 GC §82024; “Election” GC §82022; “Expenditure” GC §82025, Title 2 CCR §18225;
22 “Expressly advocates” Title 2 CCR §18225(b)(2), “General purpose committee” GC
23 §82027.5; “Independent expenditure” GC §82031; “Measure” GC §82043; “Payment” GC
24 §82044; “Person” GC §82047; “Primarily formed committee” GC §82047.5; “Proponent
25 of a state ballot measure” GC §82047.6; “Proponent” Elections Code §9002; “Made at
26 the behest of” Title 2 CCR §18225.7; “Substantial personal benefit” GC §89511;
27
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1 termination of filing requirements GC §84214, Title 2 CCR §18404; Establishment of
2 campaign contribution accounts GC §85201; Establishment of Separate Controlled
3 Committee for Each Campaign Account Title 2 CCR §18521; and Communications
4 Identifying State Candidates Title 2 CCR §18531.10.

5 Informed by these various definitions, the court finds that there are at least three
6 conflicts between Government Code section 85303 and Regulation 18530.9.
7

8 First, Section 85303(c) provides that Chapter 5 of the PRA, including Sections
9 85301 and 85302, imposes no limit upon a person's contribution to a committee if the
10 contribution is not used to make contributions to a candidate (subject to an exception in
11 Section 85310 discussed later). To the contrary, Regulation 18530.9 relies upon Sections
12 85301 and 85302 to impose limits upon a person's contribution to a committee even if it is
13 not used to then make a contribution to a candidate. Regulation 18530.9 is founded upon a
14 presumption that all contributions to a candidate-controlled ballot measure committee are
15 in "reality" contributions to the candidate who controls the committee, or are presumed to
16 be used to make such contributions to the controlling candidate. This is the case under
17 Regulation 18530.9, even if the contribution to the candidate-controlled ballot measure
18 committee is not used for the controlling candidate's campaign, "election-related
19 activities," the candidate's expenses of holding office, to identify the candidate in
20 communications, to expressly advocate on behalf of the candidate, or to confer a
21 substantial or direct personal benefit upon the candidate. The contribution to the controlled
22 committee is still presumed to be a contribution to the controlling candidate regardless of
23 the actual use of the contribution. In this regard, a candidate-controlled ballot measure
24 committee is treated the same as a candidate's controlled campaign committee. The
25 statutory authorities cited for Regulation 18530.9 are Government Code Section 82016
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1 defining "Controlled committee," Section 82043 defining "Measure," and Sections 85301-
2 85302 regarding maximum contributions to candidates.

3 Three defined terms under the PRA are of special import in assessing this conflict.
4 In light of Government Code sections 82007, 82013, 82015, 82016, 82025, 82027.5,
5 82043, 82047.5, the term "committee" as employed in Section 85303, may include a
6 candidate-controlled primarily formed or general purpose ballot measure committee
7 depending upon the monetary activity of the specific entity. Pursuant to Government Code
8 section 82016, a candidate "controlled committee" is a committee over which the
9 candidate, his or her agent, or any other committee he or she controls, "has a significant
10 influence on the actions or decisions of the committee." Pursuant to Government Code
11 sections 82015, 82044, and Title 2 CCR §18215, the term "contribution" as employed in
12 Government Code section 85303 does not include a payment made for purposes unrelated
13 to a candidate's candidacy for elective office or for "election-related activities." The term
14 "contribution" also excludes a payment which is made by a ballot measure committee for
15 a communication in which the ballot measure supported or opposed by the committee is
16 endorsed or opposed by a candidate, and the communication does not expressly advocate
17 the nomination or election of the endorsing candidate or the defeat of an opponent of the
18 endorsing candidate.
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22 Thus, the first conflict between Section 85303(c) and Regulation 18530.9 arises
23 because provisions of Chapter 5 (i.e. Sections 85301 and 85302) are employed by the
24 challenged regulation to impose limits upon contributions made to a committee, even
25 though the contributions are not in fact necessarily used to make a "contribution" to the
26 candidate as that term is currently defined in the PRA and related regulations. In this
27 respect, the court notes that the presumption of "contribution" under Regulation 18530.9,
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1 seems at odds with the specific definitions of the term "contribution," and more
2 particularly the exclusion of certain payments from those definitions, as currently
3 contained in Government Code section 82015(a),(b)(2)(B)(iii), and (C), as well as Title 2
4 CCR section 18215(c)(1), (4)(i)-(iii), (7) and (15).

5 Second, Regulation 18530.9 conflicts with the committee contribution limit
6 exception acknowledged in Section 85303(c). The exception referenced in Section
7 85303(c) is contained in Section 85310(c). Section 85310(c) provides that any payment
8 received by a committee that makes a communication that clearly identifies a candidate for
9 elective state office and is made at his or her behest, but does not expressly advocate the
10 election or defeat of the candidate, which is published within 45 days of an election, is
11 subject to the \$25,000 contribution limit specified in subdivision (b) of Section 85303.
12 Despite the express \$25,000 limit set forth in Section 85310(c), Regulation 18530.9 limits
13 any such contributions to \$3,000, \$5,000 or \$20,000 (adjusted for CPI) depending upon
14 the status of the candidate that controls the ballot measure committee that receives a
15 payment meeting the criteria of Section 85310(c). Regulation 18530.9 ostensibly
16 addresses this apparent conflict by merely stating that the lower contribution limits are
17 imposed under Regulation 18530.9(b) "notwithstanding" the higher express limit
18 statutorily permitted under Section 85310(c).
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22 Third, Regulation 18530.9 conflicts with Section 85303(a) even if one accepts the
23 FPPC's presumption that all contributions to a candidate-controlled ballot measure
24 committee are in fact contributions to the controlling candidate. Section 85303(a)
25 provides that a committee may not accept any contribution totaling more than five
26 thousand dollars (\$5,000) per calendar year for the "purpose of making contributions to
27 candidates for elective state office." Again, FPPC asserts that any contribution made to a
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1 candidate-controlled ballot measure committee is in “reality” a contribution to the
2 candidate. (FPPC Opp., p.13:1-6.) However, Regulation 18530.9 permits a candidate-
3 controlled ballot measure committee, controlled by a candidate for Governor, to accept
4 contributions of twenty-thousand dollars (\$20,000 adjusted for CPI) per election. In other
5 words, the regulation effectively increases the express contribution limit established in
6 Section 85303(a) by \$15,000 for gubernatorial candidates who control the recipient ballot
7 measure committee.
8

9 The court also notes that Regulation 18530.9 appears inconsistent with
10 Government Code sections 85201, 85316, 89510, and 89512.5 which require all
11 contributions made to a candidate to be deposited and held in a single identified account,
12 to be used only for the expenses of the candidate’s campaign and of holding office, and to
13 be limited to the candidate’s post-election net debts outstanding from the election.
14 Regulation 18530.9 is inconsistent with these provisions because it does not require
15 contributions to a candidate-controlled ballot measure committee to be deposited in the
16 candidate’s account, or to be used solely for the candidate’s campaign or lawful
17 officeholder expenses, or to be limited to outstanding post-election net debt in the case of
18 qualifying general purpose committees. These omissions are inconsistent with the PRA
19 because the new regulation is based entirely upon the presumption that all such
20 contributions are ‘contributions made to a candidate,’ but the contributions are not
21 consistently treated as such under the regulation.
22
23

24 Based upon these conflicts and inconsistencies between the challenged regulation
25 and the PRA, the court finds that the plaintiffs have at a minimum, demonstrated a
26 reasonable probability that they will succeed upon their claim that Regulation 18530.9
27 conflicts with the PRA and thus exceeds the FPPC’s rulemaking authority. The court
28

1 makes this finding after affording great deference to the FPPC's rulemaking expertise and
2 authority.

3 These statutory conflicts alone, would not warrant the injunctive relief sought by
4 the plaintiffs because the only harm occasioned by the bare statutory infirmities is the
5 existence of the invalid regulation until the action is finally resolved. Accordingly, the
6 court must address the complainants' constitutional challenges, and particularly their
7 claims of heightened constitutional harms.
8

9 Whether Regulation 18530.9 Is Unconstitutional

10 Plaintiffs and Intervenors argue that the challenged regulation's chilling effects
11 upon issue advocacy unconstitutionally impinge upon their freedoms of speech and
12 association. Plaintiffs and Intervenors also contend that the challenged regulation's
13 varying contribution limits disparately affect them, and thereby deny them the equal
14 protection of the law.
15

16 The court has specifically reviewed and considered *Buckley v. Valeo* (1976) 424
17 U.S. 1 ("Buckley"), *Citizens Against Rent Control, Inc. v. City of Berkeley* (1981) 454
18 U.S. 290 ("Citizens"), *Nixon v. Shrink Missouri Government PAC* (2000) 528 U.S. 377
19 ("Nixon"); *McConnell v. Fed. Elec. Comm'n* (2003) 540 U.S. 93 ("McConnell"), and the
20 parties' thorough analyses of those cases and others in their points and authorities. The
21 court finds no "controlling" authority among them, contrary to the parties' opposing
22 analyses. Neither *Citizens* nor *McConnell* directly address the permissible constitutional
23 boundaries of contribution limits to state candidate-controlled ballot measure committees.
24 Nonetheless, the court finds at this juncture that the proper level of constitutional scrutiny
25 to be applied to laws that limit contributions to candidate-controlled ballot measure
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1 committees is to assess whether the law is closely drawn to match a sufficiently important
2 governmental purpose.

3 In light of the aforementioned authorities, the court is easily persuaded that the
4 prevention of candidate corruption, the appearance of corruption, and/or the circumvention
5 of applicable campaign contribution limits are all “sufficiently important” governmental
6 purposes, and has no quarrel with the FPPC’s stated goals. As a consequence, the court’s
7 analysis at this early stage turns to whether plaintiffs have demonstrated a reasonable
8 probability that Regulation 18530.9 shall be found not “closely drawn” to match these
9 sufficiently important purposes.
10

11 On this question, the court’s primary focus is drawn to the extraordinary and
12 presumptive breadth of the regulation’s application in light of the expansive statutory
13 definition of “controlled committee,” and its contrast to the metered definition of
14 “contribution.” Because of the extremely broad reach of the “controlled committee”
15 definition, and its “contribution presumption,” Regulation 18530.9 threatens to ensnare
16 and limit contributions for issue advocacy that have no appreciable indicia of the evils that
17 the regulation is intended to prevent. Specifically, Regulation 18530.9 is broad enough
18 that it limits contributions: (1) to an ballot measure committee whose decisions on
19 political issues, but not its expenditures, are “significantly influenced” by a candidate’s
20 agent; (2) which are contributed by people who have never made a contribution to the
21 subject candidate’s campaign(s); (3) which are contributed by people who do not
22 necessarily know the candidate’s vicarious relationship to the committee; and (4) the
23 proceeds of which cannot and will not lawfully be used for the controlling candidate’s
24 campaign, “election-related activities,” the candidate’s expenses of holding office, to
25 expressly advocate on behalf of the candidate, or to confer a substantial or direct personal
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1 benefit upon the candidate. It is difficult to comprehend how these enumerated
2 contributions could theoretically foster corruption, the appearance of corruption, or the
3 circumvention of applicable campaign contribution limits. It is likewise difficult to
4 appreciate how limiting such contributions could legitimately advance the important
5 governmental purpose of preventing those three resilient demons of campaign finance and
6 its regulation.
7

8 Furthermore, the vast scope of the term “controlled committee” in this context
9 unreasonably impairs and chills the associational rights of candidates and those directing a
10 committee who would otherwise desire to consult with them. Such associations are
11 chilled by the justifiable and reasonable apprehension that their mere association for the
12 exchange of political ideas will result in a considerable curtailment, or even termination,
13 of the committee’s ability to amass resources. Resources which are admittedly essential to
14 the modern political initiative process. Again, this highly probable and inevitable
15 ramification of the subject regulation cannot conceivably aid in anyway to achieve its
16 laudable goals, which further evinces that the regulation is not “closely drawn” to its
17 purpose.
18

19 For these reasons, the plaintiffs have demonstrated a reasonable probability that
20 they will succeed upon their claims that the regulation unconstitutionally impinges upon
21 their freedoms of speech and association, because it is not closely drawn to match the
22 identified governmental purposes. The court does not reach the plaintiffs’ contentions
23 under the Equal Protection Clause, or the Intervenor’s freedom to petition claim.
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IMMINENT IRREPARABLE HARM

Upon the issue of irreparable harm, each of the plaintiffs and intervenors describe individualized “chilling” of their efforts to support, or associate with, ballot measure committees for pure issue advocacy.

Plaintiff Citizens is a general purpose ballot measure committee that plans to raise and spend funds in support of initiatives on the next statewide ballot which may occur in the fall of 2005. Citizens contends that it is currently not controlled by a candidate, and has taken specific steps to avoid being so characterized in order to avoid the contribution limits imposed under Regulation 18530.9. Citizens represents that it desires to, and would, associate with candidates or their agents, but chooses not to in order to maximize its fundraising potential free from contribution limits. A complaint has been filed with the FPPC alleging that Citizens has violated Regulation 18530.9

Plaintiff Assembly member Richman is a “candidate” who would actively engage in supporting and directing a ballot measure committee regarding issues of interest to him, but he chooses not to do so as not to impair the fundraising potential of the committee. He also complains that he is particularly affected by the lowest contribution limit imposed upon any committee in his control due solely to his status as a candidate for elective state office, other than a statewide elective office or the office of Governor.

Intervenor Governor Schwarzenegger desires to employ his own candidate-controlled ballot measure committee “Governor Schwarzenegger’s California Recovery Team” to support and advocate various initiatives as part of his administration, but chooses not to do so due to the contribution limits imposed under Regulation 18530.9.

Intervenors Senator Campbell, Rescue California from Budget Deficits, and Taxpayers for Responsible Pensions all desire to associate in order to raise funds and make

1 expenditures to qualify and pass various initiatives, but choose not to do so in order to
2 avoid the resultant contribution limits that would be imposed due to the Senator
3 Campbell's status as a "candidate."

4 All seven complainants essentially face the same undesirable choice that they
5 contend constitutes the irreparable constitutional injury threatened by Regulation 18530.9.
6 They may associate and champion their political causes, but severely limit their ability to
7 amass resources essential to effectively advance their political ideas; or, they may maintain
8 their full financial potential in parity with their opponents, but must surrender their ability
9 to meaningfully associate and collaborate in the free exchange of political ideas.
10

11 Based upon the foregoing, the plaintiffs contend that the court must infer a threat of
12 "irreparable harm" because they have demonstrated the existence of a colorable First
13 Amendment claim. (Plaintiffs MPA, p. 15:9-21; see also Intervenor's Reply, pp.2:12-3:23.)
14 The court agrees that at least where a plaintiff demonstrates a reasonable probability of the
15 loss, or the threatened loss, of a First Amendment freedom, the plaintiff establishes an
16 irreparable injury sufficient to support injunctive relief. (*Ketchens v. Reiner* (1987) 194
17 Cal.App.3d 470, 480; citing *Elrod v. Burns* (1976) 427 U.S. 347, 373.) For the reasons
18 stated above, the court finds that the complainants have demonstrated a reasonable
19 probability of irreparable injury by the loss, or the threatened loss, of their First
20 Amendment freedoms of speech and association.
21
22

23 In opposition, FPPC argues that the balance of harms instead tilts in its favor.
24 FPPC contends that the People of California will be irreparably harmed if it is enjoined
25 from enforcing Regulation 18530.9, because the interim political process will be tainted by
26 the corruption, or appearance of corruption, caused by large contributions to candidate-
27 controlled ballot measure committees, and because the FPPC may not be able to
28

1 subsequently reverse excessive intervening and corrupting contributions if it ultimately
2 prevails in the action. The court does not disregard or discount these potential
3 consequences that may occur in the wake of an injunction. However, in light of the
4 several identified infirmities of the challenged regulation, and the resultant unnecessary
5 inroads upon the complainants' fundamental constitutional freedoms, the balance of harms
6 and equities both weigh in the complainants' favor.
7

8 FPPC also argues that the Plaintiffs and Intervenors have failed to present evidence
9 of any tangible harm, whether actual or threatened. FPPC contends that the complainants
10 have failed to show how the challenged regulation has impaired their ability to "effectively
11 advocate" their positions, or that the regulation has currently limited their fundraising
12 efforts. FPPC argues that Plaintiffs have not yet even determined which ballot measures
13 they will support, so their claims of obstructed advocacy are even more hypothetical.
14 FPPC further opines that the complainants may avoid any asserted harm simply by not
15 associating together, or supposedly not "controlling" a measure committee in the case of
16 the complaining candidates. As discussed above, the court finds that the chilling effects
17 upon the complainants' associational interests are real, significant, and sufficiently
18 supported by their evidence. It is not necessary that the complainants actually curtail their
19 resources by subjecting themselves to the letter of the regulation, merely to demonstrate
20 the intangible chilling injury. The FPPC's focus upon the financial aspects of "effective
21 advocacy," disregards the tremendous importance of the parties' free association to the
22 overall effectiveness of their advocacy, including the formative period before the
23 committee espouses an official position. And, the FPPC's suggestion that the
24 complainants may mitigate or avoid their feared harms by simply not associating, ignores
25 the plain fact that the interim lack of association is an untenable harm unto itself.
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1 Finally, in further support of its position that the complainants face no actual harm,
2 FPPC states that there is “no limitation on the overall amount in contributions any one
3 ballot measure committee – controlled by a candidate or not – can collect.” (FPPC Opp.,
4 pp. 9:22-10:1.) The court notes here that the FPPC’s final point is not correct in light of
5 the finite overall contribution limitation imposed under Regulation 18530.9, subsection
6 (d), and its incorporation of the post-election limitation under Government Code section
7 85316. Under that provision, a primarily formed ballot measure committee controlled by a
8 candidate with little or no post-election debts outstanding would be severely limited in the
9 overall amount of contributions it could receive.
10

11 The court therefore concludes that the complainants have demonstrated a
12 likelihood of prevailing on the merits of their argument that Regulation 18530.9 violates
13 their freedoms of speech and association under the First Amendment of the United States
14 Constitution. The court further concludes that the complainants have made a showing of
15 irreparable harm warranting issuance of a preliminary injunction restraining defendant
16 FPPC, and all persons acting pursuant to its direction and control, from administering
17 and/or enforcing Regulation 18530.9, until further order of the court. The FPPC shall be
18 enjoined from proceeding with any investigation of Citizens with respect to whether
19 Citizens has violated Regulation 18530.9. FPPC shall not be restrained from conducting
20 any other investigation of Citizens under the PRA not related to a purported violation of
21 Regulation 18530.9.
22

23 Evidentiary Objections

24
25 FPPC’s evidentiary objection number 1 is sustained only with respect to the court’s
26 review of the issues where the evidentiary record is restricted under Government Code
27 section 11350(d). Objection number 2 is overruled.
28

1 Plaintiffs' evidentiary objections to Tocher Dec. are sustained. Plaintiffs'
2 evidentiary objections to Stern Dec. are sustained.

3 Plaintiffs' evidentiary objection to Reply Declaration of Stern is sustained. The
4 court sustains the objection on the ground that the declaration was untimely, being served
5 on the morning of oral argument, and that its late introduction would prejudice the
6 Plaintiffs and Intervenor. Further, the court reviewed the declaration and found that it
7 contained no admissible evidence that would have any impact upon the court's ruling.
8

9 Requests for Judicial Notice

10 Plaintiffs' request for judicial notice is granted as to Exhibits A, B, C, D, E, F, H, I,
11 J, and K, subject to the limits of the FPPC's objection number 1 as sustained above.

12 Intervenor's first request for judicial notice is granted as to Exhibits A, B, and C.

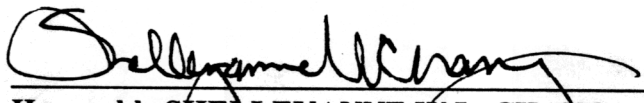
13 Intervenor's second request for judicial notice is denied.
14

15 FPPC's request for judicial notice is granted as to Exhibits A, B, C, and D. It is
16 denied as to Exhibits E, F, and G.

17 Plaintiffs shall prepare a formal order pursuant to California Rules of Court, rule
18 391
19

20
21 Date:

3/25/05

22 
23 HONORABLE SHELLEYANNE W.L. CHANG,
24 Judge of the Superior Court of California,
25 County of Sacramento
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